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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 SUSAN D. TAAMU,

10 Plaintiff,

11 v.

12 CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

13 Defendant.
14

CASE NO. C16-1438-TSZ-MAT

REPORT AND RECOMMENDATION

15 Plaintiff Susan Tamuu proceeds through counsel in her appeal of a decision of the
16 Commissioner of the Social Security Administration (Commissioner) dismissing her request for a
17 hearing based on *res judicata*. Having considered the decisions of the administrative law judge
18 (ALJ) and the Appeals Council, the administrative record (AR), and all memoranda of record, the
19 Court recommends that this matter be AFFIRMED.

20 **FACTS AND PROCEDURAL HISTORY**

21 Plaintiff filed an application for disability insurance benefits (DIB) in March 2003 with a
22 date last insured (DLI) of June 30, 2003, alleging disability as of February 22, 2001. (AR 28.)
23 This application was denied initially and upon reconsideration. (AR 45-48, 98-99.) She filed an

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1 untimely request for a hearing; the ALJ dismissed the request for a hearing and the Appeals
2 Council denied review, finding that Plaintiff did not have good cause for her tardy request. (AR
3 35-38.) Plaintiff's subsequent applications for DIB were denied due to *res judicata*. (AR 56-61,
4 114-19.)

5 Plaintiff applied for DIB again in August 2012, alleging disability since February 22, 2001.
6 (AR 120-22.) This application was denied initially and upon reconsideration, and Plaintiff timely
7 requested a hearing. (AR 64-66, 69-71, 76-79.) The ALJ held a hearing for the limited purpose
8 of determining the applicability of *res judicata* on March 20, 2014. (AR 530-51.) On August 25,
9 2014, the ALJ found that the denial of Plaintiff's 2003 DIB application remains "final and
10 binding," such that she is not disabled due to *res judicata*. (AR 28-32.) The Appeals Council
11 notified Plaintiff of its intent to dismiss her request for a hearing on May 12, 2016, finding that the
12 ALJ should have dismissed her request for a hearing rather than found her not disabled. (AR 13-
13 16.) On July 15, 2016, the Appeals Council dismissed Plaintiff's request for a hearing. (AR 8-
14 12.)

15 **JURISDICTION**

16 Generally, a determination that a claim is barred by *res judicata* is not a "final decision" of
17 the Commissioner subject to judicial review under 42 U.S.C. § 405(g). *See Krumpelman v.*
18 *Heckler*, 767 F.2d 586, 588 (9th Cir. 1985). An exception applies, however, if Plaintiff can show
19 a colorable constitutional claim of due process violation. *See Califano v. Sanders*, 430 U.S. 99,
20 107-09 (1977).

21 Plaintiff's summary of the facts surrounding her untimely request for a hearing does not
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1 identify any particular due process violation.¹ Dkt. 22 at 4-5. She contends that after she was
2 notified that her 2003 application was denied upon reconsideration, she contacted an attorney who
3 recommended that she wait for additional medical test results before requesting a hearing. Dkt.
4 22 at 4. “When these results were not forthcoming,” Plaintiff contacted at some point the agency
5 to request a form to request a hearing, and ultimately submitted that form after the deadline had
6 already passed. Dkt. 22 at 4-5. An ALJ found that no good cause existed to extend the deadline
7 to request a hearing. (AR 35.) The Appeals Council denied her request for review, finding that
8 she had not shown good cause to explain her failure to timely request a hearing in light of her
9 inconsistent statements regarding when she had contacted the agency for forms, as well as the fact
10 that her mistaken belief that she should wait to gather more medical evidence was contradicted by
11 the explicit deadline listed on the notice of reconsideration for filing a request for a hearing. (AR
12 37.) Plaintiff argues that she “believed she did not have any further legal recourse since the
13 Appeals Council notice she received did not indicate the decision could be appealed.” Dkt. 22 at
14 5 (citing AR 37-38).

15 Rather than identify any particular process to which she was entitled but denied, Plaintiff
16 instead suggests that *res judicata* should not be applied here because she was unrepresented at the
17 time she untimely requested a hearing, and “suffers from impairments that affect her cognitive
18 functioning.” Dkt. 22 at 12. While it is true that Plaintiff was unrepresented at the time of her
19 hearing request deadline, she has not shown that she did not understand the existence of the
20 deadline: that she appealed her initial denial even while unrepresented undercuts her suggestion
21 that she could not appreciate filing deadlines without an attorney. She also contacted the agency

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23 ¹ The Commissioner noted this deficiency in her briefing. Dkt. 23 at 4 (“ . . . Plaintiff does not
articulate any clear basis for her due process argument.”). Plaintiff did not file a reply.

1 in order to obtain a request form, again suggesting she was capable of understanding the relevant
2 procedures even without an attorney.

3 Plaintiff's reference to unspecified "cognitive" problems is likewise unavailing, because
4 she demonstrated an ability to appeal an initial determination as well as request a form to request
5 a hearing. *See* Dkt. 22 at 12. Under these circumstances, Plaintiff has not presented a colorable
6 due process claim. *See Klemm v. Astrue*, 543 F.3d 1139, 1145 (9th Cir. 2008) (finding that plaintiff
7 had failed to allege a colorable due process violation because "[n]othing in the record evinces a
8 mental impairment that could have prevented [the plaintiff] from understanding how to contest the
9 denial of benefits"). Accordingly, the *Sanders* exception to the jurisdictional bar does not apply.

10 Plaintiff goes on to devote the majority of her briefing to challenging the merits of the
11 Commissioner's finding that *res judicata* applied despite her submission of new evidence. Dkt.
12 22 at 3-4, 14-16. Even if the Court had the jurisdiction to review the Commissioner's decision
13 (which, as explained *supra*, it does not), Plaintiff has not shown error in the Commissioner's
14 finding that the new evidence was not material to the determination of Plaintiff's disability before
15 her DLI. (AR 29-32.) The ALJ as well as the Appeals Council summarized the new evidence and
16 both emphasized that it was dated more than 10 years after the DLI and was inconsistent with the
17 contemporaneous evidence. (AR 8-12, 29-32.) This reasoning is legally sufficient. *See Johnson*
18 *v. Shalala*, 60 F.3d 1428, 1433 (9th Cir. 1995) (holding that an ALJ may discount a post-DLI
19 opinion because it is inconsistent with pre-DLI evidence).

20 Because Plaintiff has not shown that an exception applies to permit this Court to review
21 the Commissioner's *res judicata* determination, or that the determination was erroneous in any
22 event, the Court should affirm the Commissioner's decision dismissing Plaintiff's request for
23 hearing.

1 CONCLUSION

2 For the reasons set forth above, the Court recommends this matter should be AFFIRMED.

3 DEADLINE FOR OBJECTIONS

4 Objections to this Report and Recommendation, if any, should be filed with the Clerk and
5 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and
6 Recommendation is signed. Failure to file objections within the specified time may affect your
7 right to appeal. Objections should be noted for consideration on the District Judge's motions
8 calendar for the third Friday after they are filed. Responses to objections may be filed within
9 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will be
10 ready for consideration by the District Judge on September 15, 2017.

11 DATED this 31st day of August, 2017.

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13 Mary Alice Theiler
14 United States Magistrate Judge